

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

In the Matter of

AG File No.200100978

LEVEL PROPANE GASES, INC.,

Respondent.

TO: LEVEL PROPANE, INC.
830 Canterbury Rd.
West Lake, OH 44145
Attn.: Brian Salvagni,
General Counsel
FAX: 440-808-8160

NOTICE OF INTENDED ACTION

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, pursuant to the provisions of the Michigan Consumer Protection Act, MCL 445.901 et seq., MSA 19.418(1) et seq., gives ten (10) days notice to LEVEL PROPANE before filing a lawsuit under the Act.

Before the Attorney General files suit, LEVEL PROPANE will have an opportunity to confer with the Attorney General, or her designated representatives, regarding its intention to cease and desist from engaging in certain unfair, unconscionable or deceptive methods, acts, and practices in the conduct of trade or commerce and to provide remedies for its past conduct.

I.

ALLEGATIONS

1. Level Propane, Inc., is an Ohio corporation in the business of supplying propane at retail to consumers in many Michigan counties.

2. Propane, like electricity, natural gas, and heating oil, is a source of energy for consumers. Propane is an indispensable source of fuel for cooking and heating the dwellings and hot water supply of thousands of Michigan consumers who lack immediate access to natural gas. Without an adequate supply of propane, consumers cannot cook or heat their dwellings and water, to the detriment of the health and welfare of propane customers and their families and dependents, particularly children, senior citizens, and individuals in poor health. The inability of consumers to heat their dwellings and water supply may also cause property damage.

3. Level Propane offers various different arrangements to its customers for propane rates and delivery.

4. Many customers have entered into exclusive contracts with Level Propane and lease propane tanks from the company. Level Propane remains the owner of the tanks; under Michigan law, only the owner of the tank may deliver, or authorize the delivery, of propane into the tank. MCL 429.112; MSA 28.528(2).¹

5. In order to protect themselves against rises in propane prices, many consumers have entered into “lock-in” contracts, which specify a price per gallon at which consumers are entitled to buy propane. Some “lock-in” consumers have paid additional fees to extend the lock-in period. Some consumers have enrolled in a “pre-buy” program, which allows consumers to purchase certain quantities of propane at a specified price in advance of delivery. Other consumers, relying on Level Propane’s price guarantees, did not enroll in extended lock-in or pre-buy plans.

6. Consumers have different options for ordering delivery of propane. Some consumers are on “will-call” or “COD” (cash on delivery) plans, which allow consumers to call

¹ No person *except the owner thereof or persons authorized in writing by the owner* shall fill or refill with liquefied petroleum or carbonic gas, or any other gas or compound, a liquefied petroleum or carbonic gas container; or buy, sell, offer for sale, give, take, loan, deliver or permit to be delivered, or otherwise dispose of or traffic in a liquefied petroleum or carbonic gas container or containers unless the container shall bear upon the surface thereof in plainly legible characters the name, initials, mark or other device of the owner; nor shall any person, other than the owner of a liquefied petroleum or carbonic gas container or a person authorized in writing by the owner, deface, erase, obliterate, cover up or otherwise remove or conceal any name, mark, initial or device thereon.

Level Propane to fill their tanks within 5 business days. “Courtesy fill” customers receive deliveries on Level Propane’s schedule, according to Level’s estimate of the customer’s propane use.

7. Level Propane has represented the following to consumers:

a. in the logo on its letterhead and in written correspondence to consumers, that it charges "ALWAYS the lowest cost" for its "premium propane." (See Exhibit 1.)

b. in the spring and summer of 2000, that Level Propane's prices would be guaranteed until Spring 2001. One flyer mailed to consumers in June 2000 represents that the price of propane would be guaranteed at \$0.79 per gallon and states, "[o]ur pricing strategy guarantees you a low consistent price all winter long." (See Exhibit 2.);

c. in a letter to consumers in April, 2000, in order to thank them for their loyalty to Level Propane, that the customers' propane price would be guaranteed until Spring 2001. No affirmative action by the consumer was required in order to claim this guarantee; rather, affirmative action by the consumer was only requested either to extend the price guarantee “for another full year” into the Spring of 2002, or to enroll in a “pre-buy” program providing additional discounts, depending on the time of the customer’s reply, if the customer purchased a volume of propane equal to twice the tank size. (See Exhibit 3.).

d. in the Spring 2000 edition of its newsletter, “On the Level,” that “Level Propane customers remain assured of their fuel costs.” (See Exhibit 4.)

e. in verbal price quotes by its employees to consumers, that Level Propane customers would be billed for propane at a certain price.

8. Notwithstanding these representations and consumers’ reliance on them, Level Propane has recently supplied propane to consumers without first adequately disclosing the following material facts:

- a. that the price Level Propane will later charge for the propane is higher than the “locked in” contract price;
- b. that the price Level Propane will later charge for the propane is substantially higher than prices previously charged;
- c. that the price Level Propane will later charge for the propane is substantially higher than that charged by other retail suppliers of propane;
- d. that the price Level Propane will later charge for the propane is higher than the rate it previously quoted to affected consumers, and upon which those consumers relied;
- e. that Level Propane’s guarantees of specific rates or of low or the “lowest” rates were subject to various limitations and conditions;

9. Level Propane sends invoices to consumers after their tanks have been filled, charging rates for propane that are:

- a. higher than the rates consumers have contracted for; and
- b. higher than rates Level Propane has verbally quoted to consumers or represented, in communications other than rate quotes, that consumers would be charged.

10. Level Propane charges consumers more than "the lowest" or "a low consistent price all winter long," in contravention of its representations to consumers.

11. Level Propane’s invoices warn consumers that failure to timely pay the charges assessed by Level Propane will subject them to a late charge, a negative credit report entry, and delayed delivery of future orders of propane.

12. Consumers who are of modest means or living on fixed incomes may not be able to afford to pay the inflated prices charged by Level Propane that are significantly higher than these consumers justifiably expected to pay. These consumers therefore face the prospect of not being able to obtain refills from Level Propane.

13. In addition to failing to disclose substantial price hikes, Level Propane has failed

to adequately disclose other material facts, including: the amount of a “minimum use” charge consumers will incur if they do not purchase a certain amount of propane in a year; the amount Level Propane will charge for removing a leased tank and for removing unused propane after the termination of a consumer’s contract; the additional amount per gallon a consumer will be charged over the contract price for receiving deliveries on a “will call” or “COD” basis.

14. Level Propane has failed to honor its offer to pay consumers an advertised fee (or credit their accounts) for referring new customers.

15. Level Propane has not adequately responded to or processed communications from consumers, resulting in: untimely deliveries of propane; deliveries after consumers have instructed Level Propane not to fill their tanks; unaddressed complaints about leaks and other safety concerns; and substantial inconvenience to consumers, many of whom have waited on hold for protracted periods and had their calls prematurely terminated.

II.

VIOLATIONS OF THE MICHIGAN CONSUMER PROTECTION ACT

LEVEL PROPANE’s practices described above violate the Michigan Consumer Protection Act.

Section 2(d) of the act provides, in part:

“Trade or commerce” means the conduct of a business providing goods, property, or service primarily for personal, family or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

Section 3(1) of the Michigan Consumer Protection Act, MCL 445.903(1), prohibits the following unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce:

* * *

(g) Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented.

(h) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity in immediate conjunction with the advertised goods or services.

* * *

(n) Causing the probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

* * *

(q) Representing or implying that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.

* * *

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

* * *

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

* * *

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner.

III.

AUTHORITY OF THE ATTORNEY GENERAL

The Attorney General is statutorily authorized under the Michigan Consumer Protection Act, MCL 445. 901 et seq., to initiate legal action to protect Michigan consumers. Section 5 of the Act provides:

Sec. 5. (1) When the attorney general has probable cause to believe that a person has engaged, is engaging, or is about to engage in a method, act, or practice which is unlawful pursuant to section 3, and upon notice given in accordance with this section, the attorney general may bring an action in accordance with principles of equity to restrain the defendant by temporary or permanent injunction from engaging in the method, act, or practice. The action may be brought in the circuit court of the county where the defendant is established or conducts business or, if the defendant is not established in this state, in the circuit court of Ingham county. The court may award costs to the prevailing party. For persistent and knowing violation of section 3 the court may assess the defendant a civil penalty of not more than \$25,000.00.

(2) Unless waived by the court on good cause shown not less than 10 days before the commencement of an action under this section the attorney general shall notify the person of his intended action and give the person an opportunity to cease and desist from the alleged unlawful method, act, or practice or to confer with the attorney general in person, by counsel, or by other representative as to the proposed action before the proposed filing date. The notice may be given the person by mail, postage prepaid, to his usual place of business or, if the person does not have a usual place of business, to his last known address, or, with respect to a corporation, only to a resident agent who is designated to receive service of process or to an officer of the corporation.

IV.

LEVEL PROPANE'S OPPORTUNITY TO COMPLY WITH MICHIGAN LAW

Within ten (10) days after receiving this Notice, LEVEL PROPANE has the opportunity to cease and desist the alleged unlawful methods, acts or practices, and to agree to remedy harm caused by its past practices, prior to commencement of a legal action. If LEVEL PROPANE elects to cease and desist, that fact will be taken into consideration by this office in determining whether to file a lawsuit.

Whether or not LEVEL PROPANE agrees to cease and desist the alleged unlawful practices, within ten (10) days after receiving this Notice, LEVEL PROPANE may request an opportunity to confer with a representative of the Attorney General in person, by counsel or by other representative as to the proposed lawsuit before it is filed.

Instead of filing a lawsuit against LEVEL PROPANE the Attorney General may accept a formal assurance in accordance with section 6(1) of the Michigan Consumer Protection Act, that the alleged unlawful practices will be discontinued and that corrective action will be taken. Section 6 provides:

(1) When the attorney general has authority to institute an action or proceeding pursuant to section 5, [s]he may accept an assurance of discontinuance of a method, act, or practice which is alleged to be unlawful under section 3 from the person who is alleged to have engaged, be engaging, or be about to engage in the method, act, or practice. The assurance shall not constitute an admission of guilt nor be introduced in

any other proceeding. The assurance may include a stipulation for any or all of the following:

- (a) The voluntary payment by the person for the costs of investigation.
- (b) An amount to be held in escrow pending the outcome of an action.
- (c) An amount for restitution to an aggrieved person.

(2) An assurance of discontinuance shall be in writing and may be filed with the circuit court of Ingham county. The clerk of the court shall maintain a record of the filings. Unless rescinded by the parties or voided by a court for good cause, the assurance may be enforced in the circuit court by the parties to the assurance. The assurance may be modified by the parties or by a court for good cause.

V.

CONSEQUENCES OF LEVEL PROPANE'S VIOLATIONS

After LEVEL PROPANE has been provided with an opportunity to confer, and unless an Assurance of Discontinuance is accepted, or it is determined that there is no cause for action, the Attorney General may file a lawsuit against LEVEL PROPANE in Circuit Court as provide in section 5(1) of the Michigan Consumer Protection Act. A lawsuit under this act may result in the issuance of an Injunction, the imposition of a civil penalty of up to \$25,000.00 for persistent and knowing violations of the Act, and other relief ordered by the court.

The Attorney General may also bring a class action on behalf of persons residing in or injured in this state as provided in section 10 of the Act.

If LEVEL PROPANE decides to exercise its opportunity to confer before the lawsuit is filed, it must contact the undersigned Assistant Attorney General within ten (10) days after receiving this Notice to avoid the institution of legal action in Circuit Court.

JENNIFER M. GRANHOLM
Attorney General

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Dated: January 22, 2001